

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

**MESSAGEPHONE, INC.,**

Plaintiff

V.

**SVI SYSTEMS, INC.,**  
an Illinois corporation, and  
**THARALDSON PROPERTY**  
**MANAGEMENT, INC. d/b/a**  
**HOLIDAY INN EXPRESS,**  
a North Dakota corporation,

**Defendants.**

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CIVIL ACTION NO. 397CV-1813H

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS

**FILED**

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NANCY BOHERTY, CLERK

BY [Signature] Deputy

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**STIPULATED PROTECTIVE ORDER AGAINST  
UNAUTHORIZED USE OR DISCLOSURE OF  
CONFIDENTIAL INFORMATION**

It is hereby stipulated and agreed by and between counsel for the parties, MessagePhone, Inc., SVI Systems, Inc., and Theraldson Property Management, Inc. d/b/a Holiday Inn Express, that the terms and conditions of this Stipulated Protective Order shall be applicable to and govern depositions, documents and tangible things produced in response to requests for production thereof, answers to interrogatories, responses to requests for admissions, and all other discovery taken pursuant to the Federal Rules of Civil Procedure (hereinafter "discovery"), as well as testimony adduced at trial, matters in evidence, and other information exchanged by the parties in the captioned action (hereafter referred to as "this action") or produced by a third party witness which the disclosing party designates as confidential hereunder.

Nothing contained in this Order shall affect the right of the producing party to disclose or use for any purpose the documents or information produced and/or designated by it as "CONFIDENTIAL."

**IT IS HEREBY ORDERED AS FOLLOWS:**

**1. DESIGNATION OF CONFIDENTIAL MATERIALS**

A. Any party or third party witness to this action (hereafter referred to as a "designating party") shall have the right to designate as "CONFIDENTIAL" any information or thing it believes in good faith constitutes or embodies matter containing or reflecting trade secrets, non-public research or other similar non-public, confidential or proprietary information, or information otherwise covered by a legitimate right or interest of privacy. "CONFIDENTIAL" materials and information shall not include any information which:

- (i) at the time of the disclosure hereunder is available to the public; or
- (ii) after disclosure hereunder becomes available to the public through no act, or failure to act, by the receiving party; or
- (iii) the receiving party can show (a) was already known to the receiving party; (b) was independently developed by the receiving party; or (c) was received by the receiving party, after the time of disclosure hereunder, from a third party having to right to make such disclosure.

Any information, document, thing, or deposition page designated "CONFIDENTIAL," copies thereof, information contained therein, and any summaries, charts or notes containing such confidential information, shall be treated in accord with the terms of this Protective Order.

B. Any discovery that any party wishes to protect against unauthorized disclosure or use shall be designated as "CONFIDENTIAL" by having stamped or affixed thereon (insofar as possible) the word "CONFIDENTIAL." All documents or other tangible things (hereinafter "documents") to be so designated shall be marked prior to the provision of a physical copy thereof to the receiving party. In the event documents are produced for initial inspection at a place agreed to by the parties, such documents may be produced for inspection

of counsel for the requesting (receiving) party before the documents are marked "CONFIDENTIAL," and before the furnishing party delivers copies of the documents selected by the requesting (receiving) party. In such cases, documents shall be inspected only by those persons for the requesting (receiving) party permitted access to materials and information designated "CONFIDENTIAL." The furnishing party shall then have an opportunity to designate the documents as "CONFIDENTIAL" or not, pursuant to the provisions of this Order, prior to furnishing copies to the receiving party.

C. Portions of deposition transcripts may be designated "CONFIDENTIAL" by any party or any deponent either (a) during the deposition, in which case the transcript of the designated testimony shall be bound in a separate, sealed volume and marked "CONFIDENTIAL" by the reporter, or (b) by written notice to all counsel of record within twenty (20) days after the deponent or its counsel receives the transcript. Pending the expiration of twenty (20) days after a deposition transcript is received by the deponent or his counsel, all receiving parties and persons representing receiving parties shall treat the deposition transcript as if it had been designated as "CONFIDENTIAL." In addition, the deponent, during the twenty-day period, may show the deposition transcript to other persons who are bound by this Protective Order and who already have access to the material which is or may be designated "CONFIDENTIAL." With regard to designations made during the deposition, the designating party shall have the right to have all persons, except the deponent and its counsel, outside counsel of record for named parties, the court reporter, and such other persons bound by this Protective Order, excluded from a deposition, or any portion thereof, before the taking of testimony which has been designated "CONFIDENTIAL" under this Protective Order.

D. If inspection, measuring, testing, sampling or photographing of a party's processes, products, equipment, premises or other property will reveal or disclose information

that is confidential, the producing party shall advise the party or parties seeking the discovery that the inspection, measuring, testing, sampling or photographing will be permitted only on a confidential basis and that material discovered and the information derived from that material shall be treated as "CONFIDENTIAL." Such notice shall be provided at least five (5) days in advance of discovery. Subject to the provisions regarding inadvertent disclosure (see ¶8C) or unless otherwise agreed by the parties or ordered by the Court, any confidentiality is waived if the party providing the discovery fails to advise the party or parties seeking the discovery in advance that any inspection, measuring, testing, sampling or photographing will be permitted only on a confidential basis, unless the producing party is able to establish good grounds as to why such notice was not previously provided. If photographing or taping of premises, products, equipment, processes or other property is made, such pictures or tapes or other documents recording the discovery shall bear the appropriate legend in accordance with this Order on the photograph or videotape itself, and on any exterior packaging of same.

**2. RESTRICTION ON DISCLOSURE OF DESIGNATED MATERIALS**

A. No information or material designated "CONFIDENTIAL" shall be disclosed to any person or entity except as set forth in this Order. No person shall use any material or information designated "CONFIDENTIAL" except for purposes of preparation and trial of this action.

B. Subject to paragraph 2(C), and any further Order of the Court, information and material designated as "CONFIDENTIAL" shall not be provided, shown, made available, or communicated in any way to any person or entity with the exception of:

(i) outside attorneys of record for each party, their partners, shareholders, and associates who are working on this action on behalf of any party, and the paralegal

assistants, stenographic, and clerical employees working under the direct supervision of such attorneys;

(ii) independent experts and consultants who are expressly retained or sought to be retained by any attorney described in paragraph 2(B)(i) to assist in the preparation or trial of this action, with disclosure only to the extent necessary to perform such work. Independent experts or consultants, as used in this paragraph, shall not include any regular employee or agent of the receiving party. "CONFIDENTIAL" material shall not be disclosed to any independent expert or consultant until that person has executed a written declaration in the form attached hereto as Exhibit A, acknowledging that he or she has read a copy of this Protective Order and agrees to be bound by its terms. At least ten (10) days before any "CONFIDENTIAL" information may be disclosed to any independent expert or consultant, including a copy of the person's curricula vitae or resume. If the designating party makes a written objection to the proposed expert or consultant within the ten (10) day period, no disclosure of "CONFIDENTIAL" information may be made to the proposed expert or consultant, unless and until authorized by order of the Court or further agreement of the parties;

(iii) court reporters;

(iv) the Court or its staff in connection with the Court's administration and adjudication of this action;

(v) outside vendors who perform microficheing, photocopying, computer classification, or similar clerical functions, but only for so long as necessary to perform those services;

(vi) any other individuals who are mutually agreed upon in writing by the parties, or who are approved by the Court upon motion by either party; and

(vii) two designated corporate representatives from each party, namely Joel Pugh and Doug Neel for MessagePhone, Inc., Alfred A. Norcott and Elizabeth W. Salmon for SVI Systems, Inc., and Nancy Lewis and Carey Miller for Tharaldson Property Management, Inc. "CONFIDENTIAL" material shall not be disclosed to any corporate representative until that person has executed a written declaration in the form attached hereto as Exhibit A, acknowledging that he or she has read a copy of this Protective Order and agrees to be bound by its terms independent experts and consultants who are expressly retained or sought to be retained by any attorney described in paragraph 2(B)(i) to assist in the preparation or trial of this action, with disclosure only to the extent necessary to perform such work. Independent experts or consultants, as used in this paragraph, shall not include any regular employee or agent of the receiving party. "CONFIDENTIAL" material shall not be disclosed to any independent expert or consultant until that person has executed a written declaration in the form attached hereto as Exhibit A, acknowledging that he or she has read a copy of this Protective Order and agrees to be bound by its terms. The written declaration shall be forwarded to the non-retaining party at least ten (10) days before any "CONFIDENTIAL" information may be disclosed to any independent expert or consultant, including a copy of the person's curricula vitae or resume. If the designating party makes a written objection to the proposed expert or consultant within the ten (10) day period, no disclosure of "CONFIDENTIAL" information may be made to the proposed expert or consultant, unless and until authorized by order of the Court or further agreement of the parties;

C. The designation of any document as "CONFIDENTIAL" shall not preclude any party from showing the document to any person (a) who appears as the author or as an addressee on the face of the document and is not otherwise shown prior to such disclosure to have failed to receive the document, (b) who has been identified by the designating party

as having been provided with the document or with the information therein, or (c) who participated in any meeting or communication to which the document directly refers.

D. In the event that any "CONFIDENTIAL" material or information is used in any court proceeding in connection with this litigation, the parties shall take all steps reasonably required to protect its confidentiality during such use.

### 3. FILING DESIGNATED MATERIALS

Pursuant to Local Rules of the District Court for the Northern District of Texas, discovery materials shall not be filed with the Court. However, if it is necessary to do so for the purpose of trial, motions for summary judgment, or other motions, documents and other matter ultimately filed with the Court, including *inter alia*, transcripts of depositions, exhibits, physical evidence, answers to interrogatories or requests for admissions, briefs and memoranda, which comprise, excerpt, reproduce, paraphrase, or contain designated "CONFIDENTIAL" material, or information taken therefrom, shall be filed with and kept by the Clerk of the Court in sealed envelopes or other appropriately sealed containers on which shall be endorsed the caption of this action, an indication of the nature of the contents of the sealed envelope or container, the identity of the party filing the materials, the phrase "CONFIDENTIAL -- SUBJECT TO PROTECTIVE ORDER," and a statement substantially in the following form:

This envelope (container) contains documents (things) subject to the Protective Order entered in this action and available only to Court employees and counsel of record. It is not to be opened nor the contents thereof displayed, revealed, or made public, except by written order of Court.

No such sealed envelope or container shall be provided to any party or person, other than court employees and counsel of record, except upon further written order of the Court. Any such order shall specifically identify by name and address the person(s) who may have access to the sealed file and shall specifically designate the portion(s) of the sealed file to which such

person(s) may have access and the restrictions upon his or her use or disclosure of such materials. The foregoing provision shall not prevent an appropriately marked second copy of any paper specifically intended for review by the Court being hand delivered to the Court to assure that the same is brought promptly to the Court's attention.

**4. CANCELLATION OF DESIGNATION**

The receiving party may request the designating party to withdraw the "CONFIDENTIAL" designation from specific material. Such request shall be by written notice to counsel for the designating party. The written notice shall particularly identify the subject matter or document designated "CONFIDENTIAL" that the receiving party seeks to have redesignated. If the dispute cannot be resolved informally within seven (7) business days, a motion for further disclosure or reclassification may be filed with the Court. Pending the Court's determination of any motion contesting a confidential designation, the material shall continue to be deemed and treated as "CONFIDENTIAL," as indicated by the designating party. Thereafter, such material shall be treated in accordance with the Court's order.

**5. NOTICE**

All notices required by this Order are to be served via facsimile and with confirmation by regular mail to Michael D. Pegues at HAYNES AND BOONE, L.L.P. (plaintiff's counsel) and Patricia F. McGowan at STRASBURGER & PRICE, L.L.P. and Thomas A. Belush at LEYDIG, VOIT & MAYER, LTD. (defendants' counsel). The date by which a party receiving a notice shall respond, or other take action, shall be computed from the date indicating that the facsimile was received. Any of the notice requirements herein may be waived in whole or in part, but only in writing signed by an attorney for the designating party.

**6. DISPOSITION OF DESIGNATED MATERIALS AT TERMINATION OF THE CASE**



A. Termination of proceedings shall not relieve any person from the obligations of this Protective Order, unless the Court orders otherwise.

B. With respect to any documents marked "CONFIDENTIAL" that have been filed with the Court, upon termination of this action, the ultimate disposition of any documents marked "CONFIDENTIAL" pursuant to this order, including all copies or summaries of or excerpts from such Confidential documents which may have been made, shall be as directed by the Court upon completion of the litigation.

C. With respect to any documents marked "CONFIDENTIAL" that have not been filed with the Court, within thirty (30) days after the final adjudication of this case including appeals, or resolution through settlement, unless otherwise agreed to in writing by an attorney of record for the designating party, each party shall either (a) assemble and return all confidential material, including all copies thereof, to the party or person from whom the confidential material was obtained; or (b) certify in writing that all such material has been destroyed, except that counsel for the parties may retain copies of court filings quoting confidential information, providing such documents will be held for their internal use only, subject to the continuing obligations imposed by this Protective order. A party need not destroy or discard documents which it designated a "CONFIDENTIAL."

**7. AMENDMENTS AND EXCEPTIONS BY ORDER OF THE COURT**

This Order may be changed by further order of the Court, and is without prejudice to the rights of a party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

**8. GENERAL PROVISIONS**

A. "CONFIDENTIAL" materials and information shall be held in confidence by each person to whom it is disclosed, shall be used by the receiving party only for purposes of this action and no other purpose, shall specifically not be used for any business purpose,

and shall not be disclosed to any person who is not entitled to receive such information under this Protective Order. All "CONFIDENTIAL" information shall be carefully maintained so as to preclude access by persons who are not entitled to receive such information.

B. The designation of "CONFIDENTIAL" material or information pursuant to this Order shall not be construed as a concession by either party that such information is relevant or material to any issues or is otherwise discoverable.

C. The inadvertent or unintentional disclosure by the producing party of confidential information which it believes should have been designed as "CONFIDENTIAL," regardless of whether the information was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of a party's claim of confidentiality, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter. If a party through inadvertence produces or provides discovery of any confidential material without labeling, marking or designating it as "CONFIDENTIAL" the producing party may give written notice to the receiving party or parties that the document, thing, or other discovery information, response or testimony is "CONFIDENTIAL" and should be treated in accordance with the provisions of this Order. The receiving party or parties must treat such documents, things, information, responses and testimonies as "CONFIDENTIAL" from the date such notice is received. Disclosure of such documents, things, information, responses and testimony prior to receipt of such notice to persons not authorized to receive confidential material shall not be deemed a violation of this Order; however, those persons to whom disclosure was made are to be advised that the material disclosed is "CONFIDENTIAL" and must be treated in accord with this Order.

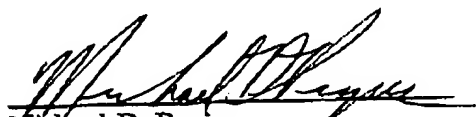
D. If a party through inadvertence produces or provides discovery which it believes is subject to a claim of attorney-client privilege or work product immunity, the producing party may give written notice to the receiving party or parties that the document is subject

to a claim of attorney-client privilege or work product immunity and request that the document be returned to the producing party. The receiving party or parties shall return to the producing party such document or thing. Return of the document by the receiving party shall not constitute an admission or concession or permit any inference that the returned document or thing is, in fact, properly subject to a claim of attorney-client privilege or work product immunity, nor shall it foreclose any party from moving the court for an order that such document or thing has been improperly designated or should be predictable for reasons other than a waiver caused by the inadvertent production.

E. The terms and provisions of this Order shall be binding on the parties and their counsel as of the effective date of this Order.

F. This Order shall survive the final adjudication of this litigation (including any appellate proceedings), to the extent information or material designated "CONFIDENTIAL" remains "confidential" and the parties specifically agree that the Court retains jurisdiction to enforce the order and to resolve any disputes relating thereto.

Dated: Nov. 21, 1997



Michael D. Pegues  
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Haynes and Boone, L.L.P.  
901 Main Street, Suite 3100  
Dallas, TX 75202-3789  
Telephone - (214) 651-5000  
Facsimile - (214) 651-5940

**ATTORNEYS FOR PLAINTIFF  
MESSAGEPHONE, INC.**

Dated: Nov. 21, 1997

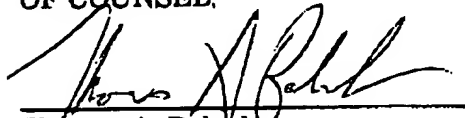


Patrick F. McGowan  
Texas State Bar No. 13642000  
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901 Main Street, Ste. 4300  
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Facsimile - (214) 651-4330

**ATTORNEYS FOR DEFENDANTS  
THARALDSON PROPERTY  
MANAGEMENT, INC. AND SVI  
SYSTEMS, INC.**

Dated: November 20, 1997

OF COUNSEL:

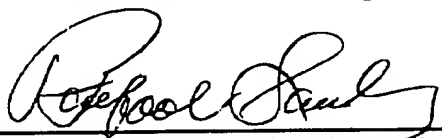


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**ATTORNEYS FOR DEFENDANTS  
THARALDSON PROPERTY  
MANAGEMENT, INC. AND  
SVI SYSTEMS, INC.**

IT IS ORDERED and stipulated that this Protective Order shall be made of record and shall govern the disclosure and use of CONFIDENTIAL documents during this action.

Dated: Nov. 24 1997

  
United States District Court Judge

**EXHIBIT "A"**

5. I hereby acknowledge that any information or material designated as "CONFIDENTIAL," that I receive in the above lawsuit is provided to me pursuant to the terms and restrictions of the STIPULATED PROTECTIVE ORDER AGAINST UNAUTHORIZED USE OR DISCLOSURE OF CONFIDENTIAL INFORMATION in this case (the Protective Order).

6. I have read the Protective Order, and agree to comply with and be bound by each of the applicable terms.

7. I hereby submit myself to the jurisdiction of the United States District Court for the Northern District of Texas for the limited purpose of assuring my compliance with the Protective Order.

8. I understand that I am to retain all of the materials that I receive which have been designated as "CONFIDENTIAL" in a manner consistent with this Protective Order. No later than thirty (30) days after final termination of this litigation, including any and all appeals, or resolution through settlement, I agree to return to the counsel of record who provided me with such materials all information and documents designated as "CONFIDENTIAL," including all copies, extracts, and summaries thereof (and including those I prepared), or I will certify in writing that all such materials have been destroyed. Such return or destruction shall not relieve me from any of the continuing obligations imposed upon me by the Protective Order.

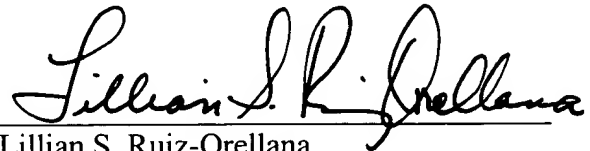
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: \_\_\_\_\_

Certificate of Service

I hereby certify that a copy of (1) the Protest Under 37 C.F.R. 1.291(a), (2) the Listing of Patents, Publications, and other Information Relied On in the Protest of Reissue Application along with the Information and (3) the Petition to Expunge Information in Reissue Application File Under 37 C.F.R. 1.59(b) were served on attorneys for Applicant by sending a copy of the same on November 2, 2001, by first class mail to:

David L. McCombs  
Haynes & Boone, LLP  
901 Main St., Suite 3100  
Dallas, TX 75202-3789.

A handwritten signature in cursive script, reading "Lillian S. Ruiz-Orellana", written over a horizontal line.

Lillian S. Ruiz-Orellana  
Assistant to Jon O. Nelson